IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-190

GENERAL ATOMIC CO.,
Petitioner

v.

UNITED NUCLEAR CORPORATION and
INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents

On Petition For a Writ of Certiorari
To The Supreme Court of New Mexico

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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1. UNC begins its Brief in Opposition with the extraordinary assertion that this case involves "the struggle of GAC to avoid the consequences of its decision to litigate, instead of arbitrate, its principal disputes with UNC . . ." (UNC Br. in Opp., p. 3). The same theme recurs throughout UNC's Brief in Opposition, culminating with UNC's declaration that "GAC elected not to put its right to arbitrate *sub judice* until November 1977—when it finally put the matter in issue by asking for a stay of trial proceedings pending arbi-

tration" (UNC Br. in Opp., p. 30). Time and again UNC tries to have this Court believe that GAC made a deliberate decision to litigate this matter in the New Mexico courts—that even as early as the first months of the litigation GAC "opted for litigation rather than arbitration, and very vigorous litigation at that" (UNC Br. in Opp., p. 8; see also pp. 14-15, 22). The impression UNC seeks to create is that only in late 1977, after it had voluntarily gone far along the litigation road, did GAC suddenly alter its strategy and contest the New Mexico courts' assumption of exclusive jurisdiction.

This effort by UNC to mislead is both curious and misguided. This Court—as much as any judicial tribunal in the land—is surely aware of the vigorous efforts GAC has been making since 1976 to contest the assumption of exclusive jurisdiction by the New Mexico courts. If, as UNC asserts, GAC "opted for litigation," reached a "decision to litigate, instead of arbitrate," and "elected not to put its right to arbitrate *sub judice* until November 1977," why did GAC immediately seek appellate review of Judge Felter's order of April 2, 1976, which channeled this case in the direction of litigation in the New Mexico courts, and why did GAC knock repeatedly on this Court's doors beseeching it to overturn obstacles erected by the New Mexico courts to arbitration and to other federal tribunals? Even if there were no pleadings in this case other than the petitions heretofore filed by GAC in this Court, it would be demonstrably false to conclude, as UNC alleges, that GAC deliberately and voluntarily "opted for litigation" in the New Mexico courts.

In making and repeating its assertion that GAC voluntarily chose to litigate rather than arbitrate, UNC —like the New Mexico Supreme Court—also overlooks

other irrefutable historical evidence. During the hearing of March 24, 1976, on UNC's motion for a preliminary injunction, UNC requested Judge Felter to enjoin the initiation of arbitration, *declaring that GAC had notified UNC of its intention to join UNC in one pending arbitration and expressing concern that UNC might be made a party in other arbitrations in "unknown places"* (p. 3a, *infra*).[1] Judge Felter then expanded the temporary restraining order he had previously issued so that it would cover "the institution or prosecution of . . . arbitration proceedings." If, as UNC now asserts, GAC had already made "Decisions to Litigate" (UNC Br. in Opp., p. 8), why did UNC have to secure an injunction against "the institution or prosecution of . . . arbitration proceedings"? Indeed, if GAC had "opted for litigation rather than arbitration," what was the purpose of GAC's notification to UNC that it intended to join UNC in a pending arbitration?

The fact is that GAC had made no "decision to litigate" before April 2, 1976. When the unlawful injunction was issued, GAC was exercising the right it had under federal arbitration law to preserve its option as to whether to litigate or to demand arbitration until the time its answer had to be filed. To this end, GAC explicitly reserved the right to demand arbitration in every substantive pleading filed before April 2, 1976. When Judge Felter unconstitutionally and improperly closed off other forums on April 2, 1976, with the issuance of his illegal injunction, GAC, having no real alternative, was remitted in his court to the lesser of the evils which he had left open—*i.e.*, litigation in which

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[1] The relevant portions of the Transcript of March 24, 1976, are reproduced as Appendix A to this Reply Brief, pp. 1a-4a, *infra*.

utilities could be joined as parties[2]—while it simultaneously sought to have Judge Felter's unlawful restraint vacated.

2. The unsoundness of UNC's assertion that GAC "opted for litigation" can be further demonstrated by examining the action which UNC says GAC should have taken to preserve its right to arbitrate. Significantly, UNC's Brief in Opposition does not defend the New Mexico Supreme Court's novel interpretation of Judge Felter's order of April 2, 1976. UNC does *not* claim in its Brief in Opposition that, under the terms of the injunction, GAC could have "serv[ed] a demand [for arbitration] on UNC in New Mexico, without regard for the location at which the arbitration would take place," as the New Mexico Supreme Court erroneously declared (Pet. App., p. 22a).[3] Rather, UNC now

[2] Seeking to eliminate the "substantial risk of inconsistent adjudications" which this Court recognized in its opinion of October 31, 1977 (434 U.S. at 18, n.11), GAC instituted a federal interpleader action in January 1976 attempting to join UNC and various utilities in one federal proceeding. GAC of course "made no demand for arbitration in the interpleader action" (UNC Br. in Opp., p. 9) because it did not have a contract right to arbitrate with all the utilities. UNC has failed to note, however, that GAC's interpleader complaint explicitly reserved its right to arbitrate with UNC "under . . . the 1973 Uranium Supply Agreement" so that if—as happened—interpleader jurisdiction was held lacking, the arbitration remedy could be invoked.

[3] There is one oblique reference to this peculiar interpretation in UNC's Brief in Opposition. UNC argues that the question whether the New Mexico courts "misinterpreted their own order is a unique issue that has no general importance warranting review by this Court" (UNC Br. in Opp., p. 25). Judge Felter did not "misinterpret" his own order. His own Finding of Fact No. 13 (Pet. App., pp. 46a-47a) demonstrates that he viewed the injunction as a prohibition against "pending or contemplated arbitration proceedings instituted by the utilities" and that he permitted only

suggests that after Judge Felter entered his order of April 2, 1976, GAC should have preserved its right to arbitrate by asking Judge Felter, under Section 3 of the Federal Arbitration Act, for a stay of further court proceedings pending arbitration (UNC Br. in Opp., pp. 13, 25, 27, 30-31). This is a hopelessly unreal suggestion.

In making this suggestion, UNC overlooks the fact that after considering an adversary presentation in briefs and oral argument, Judge Felter had, prior to April 2, 1976, decided to enjoin proceedings in all other forums and had, *on UNC's specific demand,* added a ban against the "institution and prosecution of . . . arbitration" to the terms of his prohibitory injunction. In these circumstances, would it have been other than brazen and futile for GAC to appear in Judge Felter's court on the following day with a request that the judge who had directly and unequivocally enjoined arbitration now stay his proceedings pending arbitration? In the same vein, having opposed the issuance of the preliminary injunction and being actively engaged thereafter in appellate proceedings to overturn that order by means of a Writ of Prohibition directed to the trial judge, could GAC have been expected repeatedly to make futile demands for arbitration and thereby aggravate the judge, who then had, through his own

"arbitration with UNC *in this forum.*" (Emphasis added.) If the order, as plainly understood by Judge Felter and by the parties, prohibited the very steps which are now said by the New Mexico Supreme Court to be the only means by which federal rights could have been preserved, the "misinterpretation" by the New Mexico Supreme Court rises to the level of a violation of the Due Process Clause and the Federal Arbitration Act.

order, assumed exclusive jurisdiction over this most significant case?[4] This Court has, on many occasions, in varying circumstances, ruled that a claim is not lost because of a party's failure to file utterly futile applications or requests. See, *e.g.*, *Montana National Bank* v. *Yellowstone County*, 276 U.S. 499, 505 (1928); *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24, 34 (1934); *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965); *Brown* v. *Allen*, 344 U.S. 443, 449 n.3 (1953).

Moreover, as we noted in our Petition, a request for a stay under Section 3 of the Federal Arbitration Act is not a precondition to arbitration under the Federal Arbitration Act (Pet., pp. 23-24 & n.20, 32). GAC's right to proceed to federal arbitration could not, therefore, be deemed to have been waived merely because it had not requested a stay of the trial pursuant to Section 3.[5]

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[4] Contrary to UNC's suggestion (UNC Br. in Opp., p. 28), the April 2, 1976 order was not rendered temporarily ineffective by the New Mexico Supreme Court's issuance of an "Alternative Writ of Prohibition." An "Alternative Writ of Prohibition" is simply the procedure by which the New Mexico Supreme Court indicates that it is considering the merits of a challenge to a trial court's order. If the challenge is sustained, the order is rendered void. If —as was true here—the challenge is rejected, the trial court's order is effective from the date of its entry and a party violating it, even while the "Alternative Writ" is outstanding, may be punished for contempt.

[5] Nor did the language of the eighth defense in GAC's answer, on which UNC relies (UNC Br. in Opp., pp. 13-14, 28-29), constitute an "express disclaimer" of federal arbitration. The answer was filed under the limitations imposed by Judge Felter's illegal order of April 2, 1976, which required GAC to navigate between the Scylla of a contempt sanction if it demanded arbitration in other forums and the Charybdis of inconsistent adjudications between the utility arbitrations which had previously been instituted and a possible judgment in the Santa Fe proceeding. As UNC's Statement indicates (UNC Br. in Opp., p. 12), the only arbitration permitted under Judge Felter's order was arbitration "in this forum" and "[s]ubject to the supervision of this court." Since it was then permitted to demand arbitration only in Judge Felter's "forum" and "subject to his supervision" but did not wish to arbitrate issues relating to the 1973 Supply Agreement under those conditions, GAC excluded from its demand all issues concerning the validity and enforceability of the 1973 Supply Agreement. In order to avoid inconsistent judgments, it was prepared to arbitrate, even under Judge Felter's supervision (if unwillingly forced into that forum), the utility claims which could be decided in a three-party arbitration. At the same time, however, GAC was pursuing in appellate courts—and ultimately in this Court—its right to have its disputes with UNC resolved in other forums, including federal courts and arbitration proceedings.

3. Seeking to avoid review by this Court of the plainly erroneous ruling of the New Mexico Supreme Court—and thereby to prevent reversal of a judgment concededly worth at least one billion dollars—UNC asserts that the central issues "turn upon the facts and circumstances of this particular case" (UNC Br. in Opp., p. 24).

This is, of course, true of many cases which require the application of principles of federal law to a particular record. Thus, for example, other decisions rendered by this Court concerning the authority of arbitrators, such as *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), required an evaluation of "the facts and circumstances of . . . [a] particular case" and the application to such facts of the governing rule of law. In this case, as we demonstrate in our Petition (pp. 33-36), there are substantial general questions of federal arbitration law which are raised by the decision of the New Mexico Supreme Court. Indeed, UNC's

head-on challenge to the uniform federal rule which grants a party in litigation the option to elect arbitration at any time before the filing of an answer (UNC Br. in Opp., pp. 29-30) itself presents an issue worthy of review in this Court. UNC's suggestion that a plaintiff in litigation—who has deliberately chosen to bring his claim to court—may repudiate his choice and demand arbitration before the defendant files his answer, while a defendant, who is brought into court involuntarily, has less time to invoke an arbitration clause, is contrary to all reason and conflicts with decisions of federal appellate and trial courts. See *Hilti, Inc.* v. *Oldach,* 392 F.2d 368, 371 (1st Cir. 1968); *Erving* v. *Virginia Squires Basketball Club,* 468 F.2d 1064, 1068 (2d Cir. 1972); *Lumbermens Mutual Casualty Co.* v. *Borden Co.,* 268 F.Supp. 303, 312 (S.D.N.Y. 1967); *G.B. Michael* v. *S.S. Thanasis,* 311 F.Supp. 170, 181 (S.D.N.Y. 1970); *Harman Electrical Constr. Co.* v. *Consolidated Engineering Co.,* 347 F.Supp. 392, 399 (D.Del. 1972). And the mere fact that the court below intoned some correct legal propositions but nonetheless arrived at the wrong result does not insulate its erroneous judgment from review here.

4. UNC disputes our claim that the ruling of the New Mexico Supreme Court permits it to secure indirectly the benefits of the restraint against arbitration which this Court has twice vacated. It asserts that the decision below still leaves GAC free to "mak[e] ... any assertions it pleases, however erroneous, in any 'federal forum' it chooses regarding its 'views' in regard to 'its entitlement to arbitration' " (UNC Br. in Opp., pp. 22-23). But it also claims that, under the rules of *res judicata* and Full Faith and Credit, the "federal forum" must instantly reject GAC's requests for arbitration because the New Mexico Supreme Court has determined in this case that the "entitlement to arbitration" was waived. In other words, UNC contends that this Court's two rulings mean that GAC only has the freedom to present "its entitlement to arbitration" to a "federal forum," so that the "forum" will reject it. This argument, if sustained, makes a mockery of this Court's two earlier rulings.

The most recent of the two federal proceedings initiated by UNC, which it now characterizes as "entirely irrelevant here" (UNC Br. in Opp., p. 21, n.18), illustrates the point graphically. Interrupting the sessions of the arbitration panel which was then hearing argument on the "preliminary issues" raised by UNC, UNC walked out of the arbitration proceding on March 29, 1979, and filed a lawsuit in federal court to enjoin the arbitration against the arbitrators, the American Arbitration Association and GAC. The principal ground asserted was that the doctrine of Full Faith and Credit was violated if the arbitrators failed to apply Judge Felter's ruling that GAC had waived its right to arbitrate. After GAC successfully argued for dismissal on the ground that a claim under the Full Faith and Credit doctrine does not give rise to federal-question jurisdiction (see *Minnesota* v. *Northern Securities Co.,* 194 U.S. 48 (1904)), UNC was granted leave on September 4, 1979, to amend its complaint to allege diversity-of-citizenship jurisdiction. *United Nuclear Corp.* v. *General Atomic Co., et al.,* Civ. No. 79-0329-E (S.D. Cal.). No arbitration session on the merits of the dispute has been conducted and no decision on the preliminary questions has been issued by the arbitration panel since the lawsuit was begun. And UNC is arguing in the federal court that the erroneous waiver rul-

ing we are seeking to review here is a final and binding determination which, of and by itself, precludes arbitration. If this claim is upheld, the decisions of this Court would be reduced to hollow rulings.

When UNC made the same argument to the arbitration panel, insisting that this Court's rulings meant only that GAC could present its arbitration request but that the request would immediately and automatically have to be rejected because the New Mexico trial court had conclusively decided that arbitration was waived, the chairman of the arbitration panel, the Hon. Walter V. Schaefer, former Chief Justice of the Supreme Court of Illinois, responded as follows (Transcript of December 13, 1978, p. 92):

> Well, let me suggest this: Doesn't that view indicate that the Supreme Court of the United States is playing games? You have a right to file but the tribunal has no right to decide.[6]

[6] UNC of course quotes and relies on the two sentences in this Court's opinion of May 30, 1978, which note that the earlier decision of October 31, 1977 "did not preclude . . . findings concerning whether GAC had waived any right to arbitrate" and did not "prevent the Santa Fe court . . . from declining to stay its own trial proceedings" (UNC Br. in Opp., pp. 19, 23). We have previously expressed our belief that these observations were interpretations, in the context of our request for mandamus, of the meaning of the "prior opinion" or "prior decision" of this Court (Pet., pp. 32-33). In any event, UNC has overlooked other language in this Court's decision of May 30, 1978, which supports the opposite result—*i.e.*, that the New Mexico courts may not hinder arbitration by any judicial action, including a finding of waiver (436 U.S. at 497; emphasis added):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration *or for any other reason whatsoever.*

The decision of the New Mexico trial and appellate courts that

5. On the one hand UNC endeavors to minimize the importance of the fifth question presented in our Petition and on the other hand it asserts that the New Mexico Supreme Court's ruling on that issue was "an independent ground for the denial of a stay pending arbitration . . ." (UNC Br. in Opp., pp. 37-38). In fact, the primary issue presented—*i.e.*, whether state antitrust issues are arbitrable under the Federal Arbitration Act—is much more significant than might be inferred from the paucity of judicial decisions discussing the question to date. If, as the court below has held, the mere assertion of a state antitrust claim or defense removes a dispute from the reach of the Federal Arbitration Act, parties to arbitration clauses will henceforth be able easily to prevent arbitration of ordinary contract disputes by bringing one or more of their defenses within the broad language and uncertain boundaries of local laws regulating competition. The fact that this has seldom been tried in the past is proof only that parties to arbitration clauses have not, to this time, believed that they could so facilely avoid the duty to arbitrate. State antitrust laws have, until recent years, been infrequently invoked, but if the New Mexico Supreme Court's decision is permitted to stand, many arbitrations can be expected to fall victim to UNC's innovative tactic.

Moreover, the sweeping "intertwinement" ruling issued by the New Mexico Supreme Court—which affects cases involving federal antitrust and securities act claims—is plainly erroneous. UNC concedes that the contractual question whether or not it was legally

GAC's right to arbitration was waived, when invoked as a binding judicial determination precluding arbitration, is plainly "interfer[ence] with the efforts by GAC to obtain arbitration." And it is being used by UNC to prevent arbitration altogether.

bound to supply uranium before 1971 (prior to any of its dealings with Gulf) was a "hotly disputed" issue (UNC Br. in Opp., p. 5, n.5). Also in dispute is whether Gulf withheld capital and uranium from GUNF, the corporation jointly owned by UNC and Gulf, and whether UNC was therefore "[r]endered vulnerable" and "coerced into selling its interest in GUNF . . ." (UNC Br. in Opp., p. 6). Other issues of contract interpretation such as limitation of liability and *force majeure* have been raised by UNC. These are all typically arbitrable disputes which could be resolved without reference to any antitrust question. If GAC prevailed on some of these arbitrable questions, no state antitrust issue would remain in the case. If, for example, UNC committed itself contractually by 1971 to sell uranium at prescribed prices, UNC's otherwise erroneous allegation that "in 1971 Gulf became a charter member of a uranium cartel" (UNC Br. in Opp., p. 6) and thereafter sought to tie up previously uncommitted uranium becomes totally irrelevant. Whatever Gulf may have done with respect to the "cartel" would have no causal relation to injury suffered by UNC because of its pre-existing commitment to deliver the uranium at the contract prices. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Or if an arbitration panel found that Gulf did not withhold capital and uranium from GUNF for any reason, and UNC's sale of its interest in GUNF was voluntary, there would be no materiality to the allegation that Gulf committed these acts to further the goals of the "cartel." Hence in this case, as in *Sibley* v. *Tandy Corp.*, 543 F.2d 540, 543 (1976), rehearing denied, 547 F.2d 286 (5th Cir. 1977), the assertedly nonarbitrable disputes are "dependent" upon the resolution of classically arbitrable questions.

6. The Brief in Opposition filed by I & M does not defend on the merits the opinion of the New Mexico Supreme Court. It argues only that since there is no arbitration clause in any contract between GAC and I & M, there is no reason to leave I & M as a party to this case if this Court grants the writ of certiorari.

In making this argument, I & M overlooks the realities of the situation. If Judge Felter had granted a stay of his trial after GAC was finally permitted to file arbitration demands against UNC, the proceeding before Judge Felter would not have gone ahead with only GAC and I & M as parties.[7] That dispute would, rather, have been stayed in order to await the resolution of the GAC-UNC arbitration. The losing party in the GAC-UNC arbitration would then have to deal with I & M because it would be the responsibility of that party to supply the uranium needed for the I & M agreement.

In some circumstances, the decision whether to stay a trial involving a third-party defendant who is

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[7] This was clearly indicated in GAC's Reply Brief filed in the New Mexico Supreme Court, which I & M has quoted only in part and in distorted context, in its Brief in Opposition (p. 3). The full second paragraph of the two-paragraph Argument section of GAC's Reply Brief reads as follows (the underlined words having been omitted in I & M's Brief in Opposition):

> *Had GAC obtained arbitration with UNC, it would have moved to stay part or all of the proceedings pending below between itself and I & M. The actions of the Court below prevented GAC from pursuing this course. However,* this appeal at this time raises neither the question of whether GAC is entitled to a stay of the issues between itself and I & M pending arbitration between GAC and UNC, nor the validity of any proceedings subsequent to the orders appealed from, nor the question of whether a judgment, is reversible because GAC was denied the opportunity to seek a stay of proceedings or to take other action in the Court below.

not under a duty to arbitrate pending arbitration between a plaintiff and defendant who are parties to an arbitration clause may be a routine matter of judicial discretion (see I & M Br. in Opp., p. 9, n.7). But when the party demanding arbitration has been unconstitutionally kept from pursuing that remedy for more than two years and a trial that should never have taken place has resulted, culminating in a billion-dollar default judgment that should never have been issued,[8] it is hardly a matter of everyday "judicial management" to say that the third-party defendant should reap the benefits of an erroneous refusal to stay the trial.

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[8] While insisting at the outset that the default judgment entered by Judge Felter is not in issue here (UNC Br. in Opp., p. 3), UNC sets out the text of the amended default judgment in 22 of the 25 pages of its Appendix. The virtually identical text of the original default judgment appeared at pages 2a-25a of GAC's petition for a writ of certiorari in No. 77-1269. The Santa Fe court's "recitals" and findings are totally erroneous and have been challenged in great detail in GAC's appeal now pending in the New Mexico Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the New Mexico Supreme Court reversed.

Respectfully submitted,

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September 18, 1979

APPENDIX

APPENDIX A

Excerpts From Transcript of March 24, 1976

IN THE DISTRICT COURT OF THE STATE OF NEW MEXICO

SF-50827

UNITED NUCLEAR CORPORATION, *Plaintiff*,

vs.

GENERAL ATOMIC COMPANY, et al, *Defendants*.

TRANSCRIPT OF PROCEEDINGS

From the District Court
of
Santa Fe County, State of New Mexico

Edwin L. Felter
District Judge

March 24, 1976

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[p. 2]

THE COURT: United Nuclear Corporation, Plaintiff, versus General Atomic Company, Defendant, Santa Fe Cause No. 50827. We have here before us an application for a preliminary injunction. The Court has under advisement a motion to dismiss for want of personal jurisdiction and a motion to dismiss for failure to join indispensable parties.

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[p. 6]

[MR. BIGBEE, counsel for UNC:] ... I could care less what the commitments are as between GAC and Duke. I know

our contract says it has to be on Oconee reactor and the record shows, their letter, that a previous delivery went to another reactor, McGuire, I think, a reactor which we had no obligations to. This involves the circumstances where these utilities had sold some and were trying to maneuver around their obligation. He mentions this for the singleness of obligation because they do tell us they are going to get us involved in an arbitration proceeding in this contract and our provisions—if this injunction should include arbitration they admit they make a demand on us and the contract that says 210,000 for requirement for Oconee 1 which they increased to 385,000 for their general reactor program. It shows the absurdity of joining all these things together.

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[p. 11]

[MR. BIGBEE:] . . . Now, they tell us that they are specifically—that specifically GAC plans to seek joinder of UNC in the lawsuit filed on February 24, 1976 in the United States District Court for the Southern District of New York. GAC also expects to seek the participation of UNC in the arbitration proceeding demanded by Duke on February 13, 1976, under a contract executed after we were no longer even a party to the requirements.

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[p. 14]

[MR. BIGBEE:] . . . There is these arbitration proceedings that they say—ot [sic] only Duke, but they moved to get us right in the middle of it. They didn't let us talk to them. We couldn't even discuss with the utilities whether they were willing to pay us a higher price because they said stay away from them and that matter is attached to these other matters. Now, they say all of a sudden that we are real indispensable to anything. They said that was their business, we would stay away from the utilities in relation to any contractual matters. Now they say we are indispensable. That was their business, so they changed these negotiations and what they wanted on uranium. That works two ways. They can't take this position all the time and change the agreement and then come in and say that they are indispensable. That is not the case.

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[p. 17]

[MR. BIGBEE:] . . . They also say they intend to make us a party to an arbitration proceeding so I ask that the order be expanded under any proceedings, including an arbitration proceedings with Duke, just because they have unilaterally—they have admitted, Your Honor, the question whether those parties are indispensable here.

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[p. 18]

[MR. BIGBEE:] . . . The Donovan case isn't here, but they have admitted and stated that they are going to do something to get us joined in that, not only there, but I don't know how many unknown places, in arbitration and other proceedings, and based upon their admission that this is the best place to litigate, and assuming Your Honor rules that these are not indispensable parties, it can only be for vexatious purposes.

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[pp. 21-22]

[MR. BIGBEE:] . . . We are now on another case that is not necessarily limited to the Federal court—arbitration proceedings, mainly being called to be a party in an arbitration that we have never seen the executed contract until the litigation runs. That is our Duke situation; we never saw it. The Detroit—they say they are getting problems, they are going to join us again on a 1975 agreement, so we submit that this is a classical circumstance, that we must be

given the protection from being rushed from New York City to North Carolina, to Detroit, Michigan, to Chicago, Santa Fe and Albuquerque, and if you have got a classical situation where you have a pleading that says that is precisely what they are going to do, and they don't say even subject to Your Honor's ruling on whether these are the same obligations.

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[pp. 37-38]

MR. HARRIS [counsel for GAC]: I did not add the subject of the North Carolina arbitration dispute that we have with Duke and the probability that we may seek to make them a party back there, and he talked about that. My position is it is true that we, unless retrained [sic; restrained] by Your Honor, may well take some action in North Carolina to make them a party to the arbitration where we are already a party and we've got the same thing in Detroit. I do not—in either of those instances, on the Donovan case. The Donovan case does not have anything to do with either one of those cases because there is no pending federal court case. And we rely upon the general rule under Point I of our brief that we should not be restrained from taking action to protect ourselves, if there is a reasonable ground for our doing so, to protect a legitimate interest of ours, because it is not vexatious and it is not oppressive, nor is it harrassment. We relied on that point alone to oppose the preliminary injunction that they are seeking.

MR. BIGBEE: Mr. Harris has admitted again by saying that he is going to bring us into this arbitration if it is not enjoined, that he is going to try to segment our lawsuit and our controversy concerning the validity of the contract between ourselves and them only into four separate proceedings in four different states, involving arbitration or court action, plus the one in Albuquerque and that makes five. When it has gone to that extent, I submit it is vexatious.

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